



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 46 OF 2012

BETWEEN

SAMUEL NJAU WAINAINA.....PETITIONER

VERSUS

THE COMMISSIONER OF
LANDS.....1ST RESPONDENT

THE CHIEF LAND
REGISTRAR.....2ND RESPONDENT

THE DISTRICT LAND
REGISTRAR (KIAMBU).....3RD
RESPONDENT

THE HONOURABLE ATTORNEY
GENERAL.....4TH RESPONDENT

THE COMMISSIONER OF
POLICE.....5TH RESPONDENT

JOHN RIMUI NJAU.....6TH
RESPONDENT

BONIFACE NDURA
KOIMBURI.....7TH RESPONDENT

RULING

Introduction

1. The subject of this ruling is a preliminary objection raised by the 6th respondent to the effect that the entire petition lacks merit and all matters raised herein were completely and effectually considered by a court of competent jurisdiction and thus the matter is *res judicata*. It is the contention of the 6th

respondent that the issues subject of this suit were considered and finally settled by a judgment rendered in ***Nakuru HCCC 208 of 2003***.

2. Mr Kirimi, who agitated the objection on behalf of the 6th interested party urged the court to dismiss this petition on the ground that it was an abuse of the court process. The objection was supported by Ms Muchiri for the 1st to 5th respondents and Mr Njuguna for the 7th respondent.

3. The preliminary objection is based on uncontested facts arising from ***Nakuru HCCC 208 of 2003*** whose pleadings are annexed to the further replying affidavit of John Rimui Njau sworn on 8th March 2012.

The Nakuru Case

4. John Rimui Njau, the 6th respondent herein commenced proceedings against Samuel Njau Wainaina, the petitioner herein in the Nakuru High Court by way of plaint. He alleged that he was the sole, lawful and absolute registered proprietor of MUGUGA/JET SCHEME BLOCK 218 as the first registered owner under the ***Registered Land Act (Cap 300)***. He accused the defendant of trespass and sought the following prayers in the plaint;

(i) *Eviction from the parcel of land namely Muguga/Jet Scheme Block 218.*

(ii) *Costs of the suit.*

5. A defence and counterclaim was filed on behalf of Samuel Wainaina which averred that the suit property was acquired fraudulently. The particulars of fraud were as follows;

(a) *Transferring the suit land without a grant of representation to the estate of the deceased (Nyanja Rimui) then the registered owner thereof.*

(b) *Concealing to the Land Registrar, Kiambu District that there is a succession cause in respect of the deceased that is still pending in Kikuyu Law Courts to date.*

(c) *Purporting that the suit land had reverted to the state after the death of the deceased through what he referred to as "Bona Vacatia".*

(d) *Concealing the fact that there are other beneficiaries to the estate of the deceased namely the defendant herein.*

(e) *Purporting that he applied for and obtained a valid transfer from the Government of the Republic of Kenya whilst the Government lacks the capacity in Law to transfer.*

6. As a result of the fraud, the defendant sought the following relief;

(a) *A declaration that the suit land Muguga/Jet Scheme/218 was **fraudulently registered** in the name of the Plaintiff herein and the same should revert to the original registered owner NYANJA RIMUI (now deceased).[Emphasis mine]*

7. There was joinder of issue on the defence and counterclaim. By a Notice of Motion dated 2nd March 2005, the plaintiff applied for summary judgment and vacant possession. The application was opposed by a replying affidavit of the defendant. The matter was duly heard and in a considered ruling delivered on 3rd October 2005, Justice L. Kimaru stated as follows;

Having carefully considered the rival arguments made by the parties to this application, certain facts are not in dispute.

Firstly, it is not disputed that the suit land was owned by the Government of Kenya which allocated the same to the Plaintiff. It is further not disputed that the plaintiff is the first registered owner of the suit land. The defendant did not further seriously challenge the fact that at the time the succession proceedings in respect of the deceased's estate were filed before the District Magistrate, Kikuyu the suit land had already reverted back to the Government and the same was then owned by the Government. The defendant could not therefore have inherited as alleged by the defendant. It is further not disputed that the defendant occupied the suit land in 1983, more than nine years after the death of the deceased – Nyanja Rimui. The defendant's case could have had more strength had the defendant established that he had taken possession of the suit land, either during the lifetime of the deceased or immediately upon the death of the deceased.

In the circumstances, of this case it is clear that the defendant took a risk in occupying a parcel of land whose ownership he had not first established. Now that the plaintiff has proved beyond per adventure that he is the registered owner of the suit land, and a first registered owner at that, the defendant cannot resist the plaintiff's application. Apart from what the defendant averred in his pleadings, the defendant did not exhibit any evidence to support his contention that the suit land once belonged to the deceased. What the court has been left to ruminant upon is mere speculation on the part of the defendant. There is no scintilla of evidence by the defendant that would enable this court to latch on and compel it to reach a determination that the defence and counterclaim filed by the defendant raised triable issues which would make this court order the matters in dispute to be ventilated in a full trial.

Upon careful analysis of the evidence placed before me, I do hold that to allow the defendant to defend the plaintiff's claim and to allow him to ventilate his counterclaim would amount to this court unjustly and unnecessarily delaying the just conclusion of this case. The plaintiff's claim cannot be resisted by the defendant. To order this case proceeds to full trial will just be to postpone inevitable entry of judgment in favour of the plaintiff.

For the reasons state, the plaintiff's application is hereby allowed. The defence and counterclaim filed by the defendant herein is hereby struck out. Judgement is entered for the plaintiff against the defendant as prayed in the plaint. The defendant is hereby ordered to vacate the suit land within sixty (60) days of being served with the decree of this court, in default thereof, the plaintiff shall be at liberty to evict the defendant from the suit land.

The plaintiff shall have the costs of this application and the costs of the suit.

The Petition

8. The petitioner, who was the defendant in the Nakuru case, has now filed this petition dated 8th February 2012. In addition to the 6th respondent, who was the plaintiff, he has joined state agencies as the 1st to 5th respondents and the 7th respondent, who is a purchaser of one of the subdivisions.

9. The gravamen of the petitioner's case is to be found at paragraph 13 and 14 of the petition which states;

(13) That the petitioner also verily believes that the registration of the said original parcel of land and subsequent subdivision of the suit land herein was fraudulently procured by the 6th respondent by:

(i) Concealing to the Land Registry Kiambu District that by the time the purported owner of the larger parcel of land Muguga/Jet Scheme/218, one John Rimui Njau applied for the registration there was a Succession Cause in respect of the deceased estate of Nyanja Rimui pending in the Kikuyu Law Courts being Cause No. 71 of 1981.

(ii) Concealing to the Commissioner of Land (1st Respondent herein), or the Chief Land Registrar (2nd Respondent herein) or The District Land Registrar, Kiambu District (3rd Respondent) that by the time he applied for registration there was a Succession Cause in respect of the deceased estate that is Nyanja

Rimui (deceased) (and now) still pending in the Kikuyu Law Courts being Succession Cause No. 71 of 1981.

(iii) Concealing to the said 1st, 2nd and 3rd Respondents herein on the adjudication of the suit land, and the entitled owner, hence purporting that the suit land reverted to the Government after the death of the deceased i.e. Nyanja Rimui, through what he may refer to as “Bona Vacatia”.

(iv) Concealing the facts that there were other beneficiaries to the Estate of the entitled owner to make claim to the Estate of the said deceased, Nyanja Rimui.

(v) Failing to disclose that the Government of Kenya was only holding on trust to the deceased's Estate pending the finalization of the issuing of a title Deed/Certificate, as the land had already been alienated to my deceased grandfather, the late Nyanja Rimui.

(14) That in view of the above, it is worthy for this Honourable Court to note that the 6th respondent has not only concealed material facts but also demonstrated evasiveness of facts in that:-

(i) Concealing the disputed ownership/owner of the original larger parcel of Land L.R. No. Muguga/Jet Scheme/218, and causing fraudulent registration and subdivisions thereto.

(ii) Failing to produce authentic documents to approve his purchase and or payment of levy to the Government in the manner set out by law.

(iii) Failing to disclose to the 7th respondent herein the alleged vendor (A brother in law to the 6th respondent) that he did not have a better title.

(iv) Knowing only too well that, disclosing such information, will verily establish and or unearth the background of ownership of the said entire larger parcel of land and the relationship between himself (as a paternal uncle) and myself, and has never been in possession of neither the original larger parcel of land nor the subsequent subdivisions of land herein for other thirty years, the petitioner and his entire family have lived in the suit land.

10. In the petition dated 8th February 2012 the petitioner prays for the following reliefs;

(1) A declaration that the Transfer of land LR No. Muguga/Jet Scheme/Block 218 on 8th August 2003 to the 6th respondent herein John Rimui Njau and subsequent registration and issuance of the Certificate of Title dated 27th August 2003 to him by 1st, 2nd, 3rd and 4th respondents is null and void and indeed a nullity.

(2) A declaration that the 1st, 2nd, 3rd and 4th respondents acted irregularly on the registration of the Certificate of the Title dated 27th August 2003 of LR No. Muguga/Jet Scheme and be rectified in accordance with Adjudication Register and or in accordance with Certificate of Grant of Estate of the late Nyanja Rimui.

(3) A declaration and or directions that any preferred criminal charges against the petitioner herein and or pending civil suit No. Kikuyu PMCC No. 244 of 2009, and the proceedings thereof concerning and or in so far concerning the suit land herein being LR No Muguga/Jet Scheme/218 and its subsequent subdivisions being LR No.(s) Muguga/Jet Scheme/2823/2824/2825 and 2826 respectively are null and void.

(4) A declaration/directions that the 6th and 7th respondent and or any other person in possession of title documents of concerning L R No, Muguga/Jet Scheme/218 and its subsequent sub-divisions being LR No.(s) Muguga/Jet Scheme/2823/2824/2825 and 2826, do surrender and release all the title documents in their possession in the assumption and or in the pretence, that they are bonafide owners of the L R No.

Muguga/Jet Scheme/218 and its subsequent subdivisions being LR No.(s) Muguga/Jet Scheme/2823/2824/2825 and 2828 respectively, as the same are null and void and the said Titles should be cancelled and the Title do avert to the estate of the late Nyanja Rimui (Deceased).

(5) *A declaration/directions that the decree obtained and or issued at Nakuru High Court Civil Case No. 208 of 2003 is a nullity and the same should be discharged as it relates to a suit land obtained fraudulently by the 6th Respondent.*

(6) *The Honourable Court do make, issue and give further and or such further and or other orders and consequential orders, directions findings as it may find fair and just to grant for the purposes of restoring the dignity and integrity of the registrar of the suit land in question and further for purpose of enforcing or securing the enforcement the mandatory provisions f the law as envisaged in the Constitution of Kenya, the land adjudication Act, the Registered land Act and other related provisions of the law, as relates to the petitioner.*

(7) *Costs of this petition and interest.*

Petitioner's case

11. The petitioner's position in response to the preliminary objection is that the matter before the court is commenced under the provisions of **Article 22** of the Constitution which provides for the enforcement of fundamental rights and freedoms protected by the bills of rights.

12. According to Mr Bonyo, counsel for the petitioner, this jurisdiction is a special jurisdiction and relief sought under these provisions is without prejudice to any other action lawfully available. He contends that the petitioner is entitled to pursue these proceedings notwithstanding an opportunity for appeal exists against the ruling in ***Nakuru HCCC 208 of 2003***.

13. Counsel further contends that constitutional issues could not have been raised in the previous suit as the court was not concerned with constitutional issues. In his view this suit raises substantial issues of constitutional law regarding land. Some of the issues include whether the allocation of the suit property by the state was legal or constitutional, whether the Muguga Jet Scheme was acquired legally and the constitutionality of the statement of statutory indefeasibility contained in the ***Registered Lands Act (Cap 300)***. These issues counsel has argued are fundamental and could not have been determined in the previous suit.

14. Mr Bonyo also contended that the suit is instituted by the petitioner in a different capacity. In the previous suit he brought the suit in his own name but in the present suit he brings it for the benefit of the Estate of Nyanja Rimui. If the petitioner is successful then the suit property will revert to the name of the deceased.

15. The petitioner is of the view that the doctrine of *res-judicata* is not applicable to these proceedings and the preliminary objection should be dismissed.

The Constitution and the doctrine of Res judicata

16. The general principle of *res judicata* is captured in **section 7** of the ***Civil Procedure Act*** which provides as follows;

7. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

17. The doctrine of *res judicata* has three ingredients. First, the issue in the first or previous suit must

have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of ***Karia and Another v Attorney General and Others* [2005] 1 EA 83, 89**).

18. As regards the first issue, it is clear that a court of competent jurisdiction decided the issue before the court. Although the matter before the court was an application for summary judgment, the determination of the claim was a determination on merits by a competent court.

19. The second issue concerns the substance of the dispute. The dispute concerned the ownership for the suit property. In the previous case, the court was called upon to pronounce on the ownership of title between the respective parties and in doing so the court examined the particulars of fraud pleaded and found them wanting.

20. The present case seeks a determination of ownership of the suit property. In order to reach any of the declarations that have been sought in the petition, the court will have to determine the issue of ownership and deal with the issue of fraud alleged by the petitioner. In essence the petitioner seeks the determination of the issue of fraud which the court determined. In light of explanation (4) of **section 7** of the ***Civil Procedure Act***, all the facts that constituted fraud ought to have been brought before the court in the previous case. There are no new facts presented in this petition. The matters being litigated upon were available and ought to have been brought before the court for consideration in the previous suit. I am convinced the substance of both suits is the same and leads to the same result that was sought in the previous suit.

21. The parties in the previous suit are the petitioner and the 6th respondent. In this case the state agencies are the 1st to 5th respondents and the 7th respondent is a purchaser of land. In both cases the petitioner purports to litigate for the benefit of the Estate of Nyanja Rimui (deceased).

22. In this respect, I would do no better than quote the case of ***Edwin Thuo v Attorney General & Another Nairobi Petition No. 212 of 2012 (Unreported)*** where the court stated, “ [57] **The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported)* where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*’”**

23. In my view the addition of the Attorney General and the other state agencies and the 7th respondent are merely cosmetic changes which do not affect my conclusions. The common thread running through this and the previous suit is the ownership of the property and the allegations of fraud. These matters that have been settled by the judgment in the previous suit cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as party to evade the general principle.

24. I therefore conclude that this matter is *res judicata*. It is also not in doubt that holding that a matter is *res judicata* is not inconsistent with the provisions of **Article 22** of the Constitution.

25. In the case of ***Thomas v Attorney General of Trinidad & Tobago* [1991] LRC(Const) 1001**, the Privy Council stated that it was, ‘satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of *res judicata*.’ The Board

referred to a decision of the Supreme Court of India, *Daryao and others v The State of UP and Others (1961) 1 SCR 574, 582-3* where Gajendragkar J stated, ‘*But, is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of res judicata as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to be binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32.*’

26. In *Booth Irrigation v Mombasa Water Products Limited (Booth Irrigation No.1)* Nairobi HCMisc. App. No. 1052 of 2004(Supra) the court held that, ‘*Although Constitutional Applications should be heard on merit, I find that there is nothing that would prevent a challenger of the alleged contravention moving this court to demonstrate that the application does violate fundamental principles of law including public policy for example the matter raised was res judicata. Res judicata is in turn based on the principle grounded on public policy that litigation at some point must come to an end. Res judicata is a fundamental principle of our law.*’

27. Having come to this conclusion, I hold that the matters which the petitioner seeks to litigate are barred by the doctrine of *res-judicata*.

Jurisdiction of the Court

28. An argument was made by Mr Bonyo on behalf of the petitioner that this court should consider dealing with the constitutional issues that these could not have been raised in *Nakuru HCCC 208 of 2003*. Apart from the fact that the issues in this suit could have been raised in the former suit and are covered by the doctrine of *res judicata*, the High Court has jurisdiction to adjudicate on constitutional issues even in ordinary litigation. What the petitioner seeks to do in this suit is to lodge a collateral attack on the judgment of a court of concurrent jurisdiction under the guise of an action to enforce fundamental rights and freedoms.

29. There is no separate High Court, one dealing with Constitutional matters and another one dealing with other matters. The jurisdiction imposed on the High Court by **Article 165** is to be exercised in ordinary cases save where the Constitution states otherwise. **Article 22** only introduces a special procedure for enforcing fundamental rights and freedoms but it does not take away the jurisdiction of the High Court to deal with and enforce the provisions of the Constitution and the Bill of Rights in every case before it. Thus the argument that the issues of legality of the title could not be litigated in the previous suit lack therefore lacks merit.

30. I must also draw attention to the decision of the Court of Appeal in *Peter Ng’ang’a Muiruri v Credit Bank Limited & Others Nairobi Civil Appeal No. 203 of 2006 (Unreported)* where the court clarified the jurisdiction of the High Court in respect of constitutional matters. The court stated, “*We want to set the law straight on the jurisdiction of what the learned Judge called “the Constitutional Court.” The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed “The Judicature.” Section 60 of the Constitution establishes the High Court with “unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.” Although the Constitution stipulates that the jurisdiction of the High Court in criminal and civil matters is unlimited it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers. Section 64 of the Constitution establishes the Court of Appeal with such “... jurisdiction and powers in relations to appeals from the High Court as may be conferred on it by law.” On the basis of this provision the*

*Court of Appeal cannot directly entertain an appeal from any other court other than the High Court. Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrates Courts and Kadhi Courts, and also Courts Martial. Each of those courts exercises such jurisdiction and powers as “may be conferred on it by law.” There is no provision in the Constitution which establishes what Nyamu J. referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as “Constitutional and Judicial Review” Division. It is not an independent Court but merely a division of the High Court. The wording of Section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court. With regard to protective provisions Section 84 of the Constitution does not in any of its sub-sections talk about the Constitutional Court. Instead it talks about an application being made to the High Court. In view of what we have stated above, it is quite clear that Nyamu J.’s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a court called the Constitutional Court with supervisory powers over all other courts. The Hon. the Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court. Any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. As the late Nyarangi JA once remarked in the case of *The Owners of the Motor Vessel “Lillian” vs Caltex Oil Kenya Ltd [1989]KLR 1* “Jurisdiction is everything. Without it, a court has no power to make one more step.””*

31. These sentiments of the Court of Appeal apply with equal force to the Constitution particularly the provisions of **Article 165** which grant the High Court jurisdiction to deal with matters concerning the interpretation of the Constitution and the enforcement of fundamental rights and freedoms.

32. For the avoidance of doubt this court cannot interfere with or declare the judgment and decree in *Nakuru HCCC No. 208 of 2003* as prayed in the petition.

Conclusion

33. I am of the firm view as that of Justice R. Kuloba in his book, *Judicial Hints on Civil Procedure, 1984 (Vol 1)* at page 46 in a paragraph headed, “Guard against attempts to evade the doctrine [of res-judicata]” where he states that, “One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the same matter.”

Disposition

34. I therefore strike out this petition. It is an abuse of the court process. I also award costs to the 6th and 7th respondents. The interim orders in force are hereby discharged forthwith.

DATED and DELIVERED at NAIROBI this 19th day of March 2012.

D.S. MAJANJA

JUDGE

Mr Bonyo instructed by C N Kihara and Company Advocates for the petitioner

Ms Muchiri, Litigation Counsel, for the 1st, 2nd, 3rd, 4th and 5th respondents.

Mr Kirimi instructed by Kinyanjui Kirimi & Company Advocates for the 6th respondent.

Mr Njuguna instructed by Kiarie Njuguna & Company Advocates for the 7th respondent.